STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal From the Court of Appeals
Hon. H. White, P.J., D. Sawyer, H. Saad, JJ.

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

No. 120021

vs.

STEPHEN J. MCNALLY
Defendant-Appellant.

Lower Court No. 1999-165135 FC
COA No. 223059

BRIEF OF PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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I.

It is a violation of due process to caution an in-custody suspect that he or she may remain silent, and that anything said may be used against him or her, and then employ that silence either to draw an inference of guilt or an inference that trial testimony of the accused is untruthful. Does use of silence of the accused independent of any such caution to impeach the anticipated defense violate any provision of the Constitution?

Amicus answers: "NO"

Statement of Facts

Amicus joins in the Statement of Facts of the appellee, the People of the State of Michigan, whom amicus supports.

Argument

I.

It is a violation of due process to caution an in-custody suspect that he or she may remain silent, and that anything said may be used against him or her, and then employ that silence either to draw an inference of guilt or an inference that trial testimony of the accused is untruthful. Use of silence of the accused independent of any such caution to impeach the anticipated defense does not violate any provision of the Constitution.

"...the Fifth Amendment actually means what it says."[1]

Introduction

The Court has directed that this case be set for reargument, and invited interested parties to seek permission to file briefs *amicus curiae*. The Prosecuting Attorneys Association of Michigan seeks that permission; given the extensive coverage and analysis of the cases from this Court in the briefs filed by the parties before the initial argument, amicus will concentrate, in large measure, on the discussion of the issue presented here in the federal cases, which are in conflict.

A. The Evidentiary Context

(1) The Evidence

Police officers testified in the prosecution's case-in-chief to what defendant did after being ordered from his truck–he lost his balance, his speech was slurred, he could not recite the alphabet correctly past the letter "R,"he could not correctly count his fingers, and he lost his balance when trying to walk heel and toe. They also testified to what he did *not* do–speak incoherently, answer questions inappropriately, vomit, pass out, or fall down. Testimony was also given as to what he

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[1] Joseph Grano, *Confessions, Truth, and the Law* (University of Michigan Press: 1993), p.143

did not *say*–that he had blacked out, could not remember what occurred, had lost control of the truck, or that there was some mechanical problem with the truck. Why was this testimony elicited? In law, as in most of life, context is all important.

To place this testimony in context that which preceded it must be understood. Defense counsel listed witnesses on the witness list who were "expected to testify as to their experiences and difficulty when driving the defendant's vehicle," and ultimately listed an expert in the field of auto mechanics, asking the court to approve reasonable fees for his employment. During voir dire, defense counsel mentioned the name of the expert when informing potential jurors of the names of witnesses, and told the jurors in opening statement that there would be experts from both sides testifying about the condition of the brakes, steering, and so on, and whether "the condition of this 1979 pickup truck–contributed to the accident." Defense counsel also raised intoxication during the opening statement, in the context of whether defendant could have premeditated the killing. When the prosecutor elicited the testimony that defendant, in his initial encounters with the officers, said nothing about lack of memory, blackouts, or the condition of his vehicle having caused him to lose control of it, the prosecutor knew that these were issues in the case.

(2) <u>Impeaching the Defense</u>

The distinction between substantive and impeaching evidence can sometimes be elusive. If, under the circumstances, either A or B occurred, and a witness testifies that it was A, then ordinarily evidence that shows the witness is lying is no proof that B rather than A occurred, but only that the witness's testimony that A occurred should not be believed. But if, under the circumstances, it is clear from that evidence that whether one or the other occurred *is within the knowledge of the witness*, it is hard to avoid the conclusion that evidence that shows that the witness was lying when

he testified that A occurred shows not only that the witness is not credible, but that B occurred, it being the only other possibility. In either circumstance, though, the law calls the evidence impeachment; it is not substantive evidence, *rebutting* the testimony of the witness. Rebuttal evidence is "defined as 'evidence given to explain, repel, counteract, or disprove facts given in evidence by the opposing party. That which tends to explain or contradict or disprove evidence offered by the adverse party.'"[2] Impeaching evidence does not contradict or disprove evidence of the opposing party, but undermines the *credibility* of an opposing witness.

The prosecutor here called an expert witness in anticipatory rebuttal to the claim that the defendant's truck may have malfunctioned, causing him to strike and kill the victim. That testimony was substantive evidence with regard to the condition of the truck, the expert testifying that he found nothing that would explain sudden acceleration or swerving or an inability to stop. An expert was also called by the prosecution with regard to alcoholic blackouts and the ability of an individual to perform certain human functions–such as make a U-turn in a truck, or stop at a red light–in such a state. This testimony was also anticipatory rebuttal, being substantive evidence with regard to a defense that had been announced and was to be forthcoming.[3] But testimony that defendant did not tell the police either that he had blacked out, or that his truck had malfunctioned, was not testimony in contradiction of these defenses, but in their *impeachment*. The question, then, is whether this impeachment of the *defenses*–rather than the defendant, who did not testify–with testimony that the

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[2] *United States v Jackson*, 327 F3d 273, 306 (CA 4,2003).

[3] Compare *State v Smith*, 621 A2d 493, 510-511 (NJ Super App Div, 1993): in an attempted murder case involving a bite inflicted by a defendant infected with HIV, where in opening statement defense counsel had stated that part of the defense was that HIV "can't be transmitted" by a bite, the "State was entitled to anticipate that defense with expert testimony."

defendant did not, before Miranda warnings, tell the police either that he had blacked out or that he had experienced mechanical difficulty with the truck, is permissible under the Constitution.

B. The Fifth Amendment in History

> *"Our forefathers, when they wrote this provision into the Fifth Amendment, had in mind a lot of history which has been largely forgotten today."*[4]

The protection of the Fifth Amendment against *compelled* self-incrimination in criminal cases, and consideration of the permissibility of comments on silence, whether before arrest, after arrest, or even during trial, seem odd when one takes account of history. At the time of the Founding, and of the ratification of the Bill of Rights, no state even *permitted*, much less compelled, an accused in a criminal case to testify. It was not until 1864 that Maine became the first state to permit defendants to testify, and Congress followed suit in 1878.[5] But criminal defendants were not actually silent at their trials, they simply were not competent as sworn witnesses. Instead, the defendant was permitted–and expected–to give an unsworn statement at trial on his own behalf, and was also expected to give a statement pretrial. The failure to make a statement to the justice of the peace would be reported to the jury.[6] As Sir James Stephen noted, evidence given against the defendant operated as "so much indirect questioning," and if the defendant "omitted to answer the

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[4] *Maffie v United States*, 209 F2d 225, 237 (1954)(Judge Calvert Magruder).

[5] See Ralph Rossum, "'Self-Incrimination': The Original Intent," in Hickok, ed., *The Bill of Rights: Original Meaning and Current Understanding* (University of Virginia Press: 1991), p.276.

[6] Langbein, "The Privilege and Common Law Criminal Procedure," in *The Privilege Against Self-Incrimination*, quoted by Justice Scalia, dissenting, in *Mitchell v United States*, 526 US 314, 119 S Ct 1307, 143 L Ed 2d 424 (1999).

questions it suggested he was very likely to be convicted."[7] If a defendant was not permitted to be a witness at trial, but was expected to make unsworn statements, the failure to do so to be held against him, why, then, the inclusion of the Fifth Amendment protection against compelled self-incrimination in criminal cases?

Some scholars, Leonard Levy principal among them, take the view that the Founders, and the members of state constitutional conventions which enacted similar protections on which the Fifth Amendment was based, "failed to say what they meant," for if they meant what they said, then the common law prohibition on testimony from the accused in criminal cases rendered the Fifth Amendment superfluous.[8] Instead, concluded Levy, what those individuals drafting state Bill of Rights and the Fifth Amendment actually *meant* to do was adopt the common-law right of *nemo tenetur seipsum acusare* (no one is bound to accuse himself), which protected not only against courts in criminal cases, but against all of government, in all kinds of actions, protecting witnesses as well as the accused, and protecting against "threats of criminal liability, civil exposure, and public obloquy."[9] This redrafting of the Fifth Amendment is not tenable.

Professor Rossum nicely notes that Levy and his followers fail to take account of the very real probability–given the express language of the Fifth Amendment–that the drafters were not writing to "end some current abuse but simply to provide a floor of constitutional protection above which the common law as free to operate but below which it could not go."[10] Though it seems

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[7] J. Stephen, 1 *History of the Criminal Law of England* 440 (1883).

[8] See Levy, *The Origins of the Fifth Amendment (2d Ed)* (MacMillan: 1986).

[9] See Rossum, at 276.

[10] Rossum, at 277.

quaint now, during the 17th century the very giving of an *oath* was held itself to be a coercive act, and the ecclesiastical Court of High Commission engaged in the practice of summoning those with nonconformist opinions, requiring them to take an oath and answer questions. Refusing the oath resulted in contempt and Star Chamber proceedings; lying under oath was perjury; telling the truth under oath could subject one to prosecution for political and religious crimes. The celebrated trial of John Lilburne, a Puritan agitator who refused to take the oath, led to the prohibition of the administration of any oath obliging a person "to confess or accuse himself or herself of any crime."[11] Professor Albert Alschuler concludes that the history of the Fifth Amendment is "almost entirely a story of when and for what purposes people would be required to speak under oath."[12]

Requiring an oath of the criminally accused was coercive, and banned for that reason, as being equivalent to torture and the rack. Manuals which instructed justices of the peace on the conduct of their office warned, from the late 16th century through the mid- 19th century, that "The law of England is a Law of Mercy, and does not use the Rack or Torture to compel criminals to accuse themselves....I take it to be for the Same Reason, that it does not call upon the Criminal to answer upon Oath. For, this might serve instead of the Rack, to the Consciences of Some Men, although they have been guilty of offenses...."[13] To put the matter finely, then, the purpose of the Fifth Amendment, when understood in its historical context, was "to outlaw torture and improper methods

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[11] See Wigmore, "The Privilege Against Self-Incrimination: Its History," 15 Harv L Rev 610, 621-24 (1902).

[12] Alschuler, "A Peculiar Privilege in Historical Perspective: The Right to Remain Silent," 94 Mich L Rev 2625, 2638 (1994).

[13] See Alschuler, at 2648.

of interrogation," including the compelling of testimony under oath.[14] Put another way, the purpose of the Fifth Amendment was to preclude the obtaining of statements or testimony from the accused in criminal cases by use of coercive governmental conduct.

C. <u>The Right Not To Be Compelled vs. The "Right To Silence"</u>

> *....the privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak.*[15]

Cases and commentators often refer to a constitutional "right to remain silent" or a constitutional "right against self-incrimination." Neither, in fact, exist. First, whatever right exists does so only as against the Government, as the Fifth Amendment refers to the context of the right–"in any criminal case." Second, there is no right to remain silent. A witness can be compelled to testify under penalty of contempt, and when the witness testifies, whether under threat of punishment for refusal or not, the witness is not "waiving" a constitutional right, requiring advice of the right and a knowing and intelligent relinquishment of it. This is because there is no free-floating right to silence. Nor is there any right against self-incrimination. If an individual walked into a police station and without prompting confessed to a crime, by incriminating himself he would not be waiving any constitutional right not to do so, requiring, again, advice of the right and a knowing and intelligent relinquishment of it. Any citizen is free to incriminate him or herself, whether to the police or in court.

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[14] Alschuler, at 2631.

[15] *Jenkins v Anderson*, 447 US 231, 241, 100 S Ct 2124, 2131, 85 L Ed 2d 86 (1980)(Stevens, J., concurring).

The use of short-hand phrases in place of the actual text of the Constitution has in this instance warped the analysis of some courts. If there *is* a constitutional right to silence, then one may, as some courts have, consider whether comment on exercise of that "right" is an impermissible "penalty" for its exercise. But there is no right to silence and there is no right against self-incrimination. The actual right protected by the Constitution is against *compelled* self-incrimination. Neither the Fifth Amendment, nor the identical language of Article I, § 17, state that "Every person has a right to remain silent" or that "Every person has a right against self-incrimination." Instead, each proclaims that "No person *shall be compelled* in any *criminal case* to be a witness against himself." The right not to be compelled or coerced does not translate into a right to remain silent. The constitutional language itself simply will not bear such a construction.

The *sine qua non* for involvement of the Fifth Amendment is *coercive governmental conduct,*[16] and "few sane adults would waive a right to be free of compulsion."[17] In the absence of coercive conduct by a governmental official, the fact that an individual speaks *or chooses not to speak*, whether to some other "ordinary citizen" or even to a governmental official, has nothing to do with the Constitution. Unless in the face of official compulsion or interrogation, when one chooses not to speak he or she is not "asserting" his or her Fifth Amendment right not to be *compelled* to speak, the only right protected by both the Fifth Amendment and Article I, § 17. If coerced, and by a governmental agent, the Fifth Amendment applies, as does Article 1, § 17. A waiver/assertion analysis simply makes no sense with regard to a right to be free from compulsion; one is either compelled or one is not. Indeed, as Justice Marshall said dissenting in *Schneckloth*,

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[16] *Colorado v Connelly*, 479 US 157, 107 S Ct 515, 93 L Ed 2d 473 (1986).

[17] Alschuler, at 2627.

referring to confessions: "...no sane man would knowingly relinquish a right to be free of compulsion."[18] There is no right to silence which must be waived knowingly and intelligently,[19] there is an unwaivable right not to be coerced.[20] As Professor Grano has aptly pointed out, if there indeed exists a constitutional right to remain silent, there is no principled basis on which the right and the waiver analysis can be limited to custodial interrogation.[21]

D. Due Process and Silence

(1) The United States Supreme Court Decisions

Justice Stevens statement concurring in *Jenkins* that "....the privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak" is both cogent and correct. The United States Supreme Court has never held that comment on silence before arrest,[22] after arrest but before Miranda warnings,[23] or after arrest and after Miranda warnings, violates the Fifth Amendment. The Court, rather, has held that only

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[18] *Schneckloth v Bustamonte*, 412 US 218, 280-281, 93 S Ct 2041, 36 L Ed 2d 854 (1973).

[19] Compare the First Amendment. Surely under the First Amendment no person may be forced by the government to pray or to attend church. When millions of citizens choose voluntarily to pray or to attend the church of their choice, are they thereby surrendering their "right not to pray" or "right not to attend church," and must they do so knowingly and intelligently in the constitutional sense? Of course not: the question makes no sense unless in the context of a claim of governmental coercion. There is no "right not to pray," or "right not to go to church" under the constitution, there is a right not to be *forced* to do either by the government.

[20] See Alschuler, at 2660-2667.

[21] See Grano, *Confessions, Truth, and the Law*, p.142-143.

[22] *Jenkins v Anderson, supra.*

[23] *Fletcher v Weir*, 455 US 603, 102 S Ct 1309, 71 L Ed 2d 490 (1982).

comment on silence after arrest and *after* Miranda warnings violates not the Fifth Amendment, but due process:

> while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.[24]

But where an "implicit assurance" that silence will not be used in any way is *not* given–that is, the comment is on silence after arrest but before Miranda warnings–no constitutional issues arise. In *Fletcher v Weir* the Court held permissible cross-examination of defendant regarding why, *after arrest* but before Miranda warnings, he had not offered the exculpatory version of events that he had offered at trial, and in *Brecht v Abrahamson*[25] the Court observed that "the Constitution does not prohibit the use for impeachment purposes of a defendant's silence prior to arrest..., or after arrest if no Miranda warnings are given....Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty."

Here, the silence of McNally testified to and commented upon was silence before Miranda warnings. It was offered to impeach not his own testimony, as he did not testify, but his defenses (mechanical difficulties with the truck, alcoholic blackout) offered through other witnesses. Because McNally was under no official compulsion to speak, comment on his silence does not implicate the

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[24] *Doyle v Ohio*, 426 US 610, 618-619, 96 S Ct 2240,2245, 49 L Ed 2d 91 (1976). But see *Portuondo v Agard*, 529 US 61, 120 S Ct 1119, 146 L Ed 2d 47 (2000), where the Court, in upholding comment that defendant testified after his witnesses giving him the opportunity to tailor his testimony, said that "Although there might be reason to reconsider *Doyle*, we do not do so here."

[25] *Brecht v Abrahamson*, 507 US 619, 628, 113 S Ct 1710, 123 L Ed 2d 353 (1993).

Fifth Amendment in any way; because the comment was on silence before Miranda warnings were given, the comments and testimony do not implicate due process under *Doyle*.

(2) <u>The Split in Federal Circuits</u>

Federal circuits are divided on the question of whether silence that when used for impeachment violates nothing in the constitution violates the constitution when used as substantive evidence.[26] And there is a difference between use of evidence of any sort to *establish* the State's case-in-chief as opposed to the use of evidence *in* the State's case-in-chief, a point missed by some cases and commentators. Though use of the defendant's pre-arrest or post-arrest but pre-Miranda silence generally occurs either on cross-examination of the defendant or in rebuttal to impeach his or her credibility, or in the case-in-chief as substantive evidence, generally in the context that silence indicates an admission or acquiescence, it is quite possible for silence to be employed as

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[26] The First, Second, Sixth, Seventh, and Tenth Circuits have held that substantive use of silence that is permissible for impeachment violates the constitution; on the other hand, the Fifth, Eighth, Ninth and Eleventh Circuits have held to the contrary, though the Ninth Circuit has held that post-arrest/pre-Miranda silence cannot be used substantively. See *United States ex rel. Savory v. Lane*, 832 F2d 1011 (CA 7, 1987); *United States v. Hernandez*, 948 F2d 316 (CA 7, 1991); *Ouska v. Cahill- Masching*, 246 F3d 1036 (CA 7, 2001); *Coppola v. Powell*, 878 F2d 1562, 1568 (CA 1, 1989); *United States v. Burson*, 952 F2d 1196, 1201 (CA 10,. 1991) ; *United States v. Caro*, 637 F2d 869 (CA 2,. 1981); *Combs v. Coyle*, 205 F3d 269 (CA 6,. 2000); but compare *United States v. Rivera*, 944 F2d 1563 (CA 11, 1991); *United States v* Zanabria, 74 F3d 590 (CA 5, 1996); *United States v. Campbell*, 223 F3d 1286 (CA 11, 2000); *Vick v. Lockhart*, 952 F2d 999 (CA 8, 1991) ; *United States v. Zanabria*, 74 F3d 590, 593 (CA 5, 1996); *United States v. Oplinger*, 150 .3d 1061 (CA 8, 1998). The Ninth Circuit has now held that only pre-arrest silence is admissible as substantive evidence, but not post-arrest/pre-Miranda silence, which is admissible only for impeachment. See *United States v Whitehead*, 200 F3d 634 (CA 9, 2000); *United States v Velarde-Gomez*, 269 F3d 1023 (CA 9, 2001).

impeachment of the defense rather than the defendant, and to be offered, as it was in the present case, in anticipation of the defense that it is clear is forthcoming. A defendant may present defenses without testifying. Alibi, accident, self-defense, defense of others, even intoxication, may readily be presented through testimony of witnesses other than the defendant, and evidence of defendant's silence before arrest, or after arrest but before Miranda warnings, impeaches, rather than contradicts, these claims raised through others, and thus should be viewed as falling squarely within *Jenkins* and *Fletcher v Weir*.

But where silence of the defendant *is* employed as substantive evidence in the case-in-chief, not to impeach the defendant or his defense, but to *prove* the case-in-chief, how can evidence that violates no constitutional principle when admitted in impeachment violate a constitutional principle when employed as substantive evidence? After all, evidence taken in violation of the "actual" Fifth Amendment; that is, that is compelled, even compelled as a matter of law through a grant of immunity rather than through the use of physical force, is admissible for no purpose, not even impeachment.[27]

Those courts that have concluded that either pre-arrest or post-arrest/pre-Miranda silence (or both) cannot be employed as substantive evidence have fallen into the analytical error, avoided by this court, of transmogrifying the right against compelled self-incrimination into a right to silence. The Ninth Circuit, for example, has said that *any* silence after arrest, even before Miranda warnings

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[27] "The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless defendant, but it is no less compelled. ...we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible....A person's testimony before a grand jury under a grant of immunity cannot constitutionally be used to impeach him when he is a defendant in a later criminal trial." *New Jersey v Portash*, 440 US 450, 459, 99 S Ct 1292, 1297, 59 L Ed 2d 501 (1979).

and before questioning by the police, is an "exercise of the right to silence," comment upon which as substantive evidence is unconstitutional.[28] That court has not explained how the Fifth Amendment violation that occurs when the evidence is used substantively disappears when it is used for impeachment. By this analysis that court has excluded what is often called "demeanor evidence" when used substantively, on the ground that demeanor coupled with silence is a part of the exercise of the "right to silence,"[29] an error that this court has avoided.[30]

The Court of Appeals in *People v Schollaert*[31] captured the essence of the constitutional implications of "silence":

> In the present case, defendant's silence or non-responsive conduct did not occur during a custodial interrogation situation, nor was it in reliance on the *Miranda* warnings. Therefore, we believe that defendant's silence, like the "silence" of the defendant in *McReavy,* was not a constitutionally protected silence. On the basis of our reading of the Michigan Constitution, together with developments in Fifth and Fourteenth Amendment jurisprudence, we conclude that defendant's constitutional rights were not violated when evidence of his silence was admitted as substantive evidence.

As the Court of Appeals recognized, for "silence" to implicate either the Fifth Amendment or due process that silence must be in reliance on Miranda warnings, or during custodial interrogation (where Miranda warnings should have been given and waived as a condition precedent to the questioning). Silence that is unrelated to any official compulsion to speak is, as a matter of constitutional law, admissible.

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[28] See *United States v Whitehead, supra.*

[29] See *United States v Velarde-Gomez, supra.*

[30] *People v McReavy*, 436 Mich 197 (1990).

[31] *People v Schollaert*, 194 Mich App 158. 166-167 (1992).

E. Conclusion

No constitutional violation occurred in the instant case.

- There is no constitutional right to remain silent, and there is no constitutional right against self-incrimination.

- The Constitution protects citizens, in criminal cases, from compelled self-incrimination; evidence gained in violation of this right may not be used for any purpose, including impeachment.

- Justice Stevens statement in *Jenkins*, though never adopted by a majority of the Court, has never been rejected by a majority of the Court, provides a workable rationale for addressing questions of silence that is consistent with the actual text of the Constitution: "*....the privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak.*"

- Due process, out of a concern for fairness, protects against any use of silence when that silence may have been induced by the Government when Miranda warnings were given (though this is the current law, the United States Supreme Court has suggested that this principle may well be mistaken).[32]

- The use of a defendant's post-arrest but pre-Miranda warning silence to impeach either the defendant or his defense, presented through other witnesses, is inconsistent with neither the Fifth Amendment nor due process.

- The use of a defendant's pre-arrest silence, or post-arrest but pre-Miranda warning silence, as substantive evidence is inconsistent with neither the Fifth Amendment nor due process where the defendant was under "no official compulsion to speak."

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[32] *Portuondo v Agard*, supra: "Although there might be reason to reconsider *Doyle*, we do not do so here."

- The use of a defendant's silence "in the face of accusation," which may occur prior to arrest, is inconsistent with neither the Fifth Amendment nor due process, but is to be considered under ordinary principles of the law of evidence, which may well exclude it, depending on the circumstances.[33]

Amicus urges this court to adopt the rationale of Justice Stevens as its method of analysis, and to conclude that the impeachment of the defense that occurred in the present case violated no constitutional right of the accused.

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[33] See e.g. *People v Karem*, 106 Mich App 383 (1981); *People v Dietrich*, 87 Mich App 116 (1978); *People v McReavy, supra.*

Relief

WHEREFORE, amicus requests that the Court of Appeals be affirmed.

Respectfully submitted,

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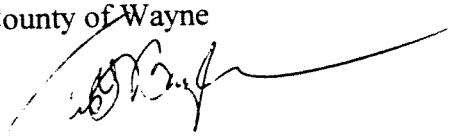

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